

As a result of his ongoing problems, claimant both voluntarily and through the recommendations of Vito J. Carabetta, M.D., reduced his working hours. At the time of the alleged accident, claimant was working only three days a week, totaling approximately 24 hours per week. Claimant had also been restricted to light duty work, having been taken off the beef saw by Dr. Carabetta.

On March 12, 2001, claimant testified he was unloading boxes of pork neck bones which he described as weighing approximately 30 pounds each. While unloading the boxes, claimant felt a sharp pain in his back with pain into the right leg. Several minutes later, the pain subsided and claimant continued working that day. He did not report the incident. The next day, claimant's pain in his right leg returned and was, as he described it, sharp.

Claimant went to the Olathe Medical Center on March 13, 2001, and received a shot of Demerol and more pain medications. Claimant then talked to store manager Mark Selders and was referred to W. David Fretz, M.D.

Claimant first saw Dr. Fretz on March 14, 2001. At that time, claimant had primarily normal testing, with a negative straight leg raise bilaterally. Claimant's deep tendon reflexes were brisk and equal, but there was tenderness on the right side at L4-L5 and in the paraspinal muscles. Claimant was referred for an MRI and instructed to return on the 16th. The MRI performed on March 15, 2001, indicated little change in the degree of disc herniation at L4-5 level, but there had been some progression since claimant's previous MRI of June 1, 1997. The central disc herniation at L3-4, showing moderately severe stenosis, was essentially unchanged.

Claimant returned to Dr. Fretz on March 16, 2001, at which time the straight leg raise was positive on the right side with pain. The tenderness on the right side of the back continued. Dr. Fretz noted that the spinal stenosis at S1 was worse since the previous MRI. It was discussed that claimant would be sent to Andrew Kaufman, M.D., for therapeutic recommendations. Claimant indicated to Dr. Fretz at that time he did not wish to consider epidural blocks or surgery.

Claimant again returned to Dr. Fretz on March 26, 2001. At this time, claimant continued to have pain in the low back, with the straight leg raise eliciting pain on the left side. Claimant was advised to keep the appointment with Dr. Kaufman and to continue on a 5-pound lifting restriction at work.

Respondent contends claimant failed to prove that his ongoing need for treatment stems from the original March 12, 2001, accident. Respondent provides, for the Court's review, a videotape of claimant performing substantial activities in and around his yard at home. The Appeals Board is aware of the videotape and the apparent discrepancies between that videotape and claimant's testimony. However, the medical records do confirm that claimant's condition after the March 12, 2001, accident worsened. Additionally, claimant's testimony regarding how the accident occurred is uncontradicted. Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). Here, the Appeals Board finds that claimant did prove accidental injury arising out of and in the course of his employment on the date alleged.

The Administrative Law Judge allowed claimant ongoing medical treatment for the condition, but denied claimant temporary total disability compensation, finding that claimant's obvious capabilities discredited his request for temporary total disability compensation. The Appeals Board agrees.

While there is evidence discrediting claimant's testimony, it is nevertheless clear from Dr. Fretz's original comments that he felt claimant in need of the referral to Dr. Kaufman for therapeutic treatments prior to the time the respondent's videotape was filmed on March 20 and 21, 2001. The Appeals Board, therefore, finds that claimant has proven an entitlement to ongoing medical treatment as recommended by Dr. Fretz, including the referral to Dr. Kaufman.

This preliminary finding is not binding in a full hearing on the claim, but is subject to a full presentation of the facts. K.S.A. 44-534a(a).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Julie A. N. Sample dated May 30, 2001, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 2001.

BOARD MEMBER

c: Dale E. Bennett, Westwood, KS
Kip A. Kubin, Overland Park, KS
H. Wayne Powers, Overland Park, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director